The Store (M) Sdn Bhd v Ang Tin Huat & Anor

HIGH COURT (IPOH) — JUDICIAL REVIEW NO 25–28–11 OF 2013
LEE SWEE SENG J
30 JULY 2014

Labour Law — Industrial Court — Award — Judicial review — Whether award liable to be quashed — Whether IC acted irrationally in finding that first respondent had breached his fiduciary duties and then holding that his dismissal was without just cause and excuse — Whether IC had acted in breach of the doctrine of proportionality — Whether punishment of dismissal too harsh in circumstances of case — Whether IC had taken all relevant factors into consideration in arriving at award — Whether there was any justification to interfere with findings and award

Sometime in October 2006 the ownership of the Fajar Supermarket (UP) Sdn Bhd ('the Fajar Supermarket') was taken over by The Store (Malaysia) Sdn Bhd ('the company'). At that time, Ang Tin Huat ('the first respondent') was the branch manager of the Fajar Supermarket in Kuala Kangsar, Perak. On 5 October 2007, the first respondent was terminated from his employment after being found guilty of two serious acts of misconduct, namely misusing the company's cash for unauthorised purpose without seeking and obtaining the approval from the head office management and misappropriating the company's trading stock for unauthorised purpose. The first respondent's claim that he was unfairly dismissed was referred to the Industrial Court ('IC'). Evidence was led before the IC of how the company cash that was allegedly misused by the first respondent was actually money raised from the sale of paper waste. The first respondent had decided to use this money which amounted to RM976.90 to host a dinner for 30 members of staff of the supermarket who had worked long and hard hours during the period prior to the Chinese New Year. However, the first respondent had not sought or obtained the approval of the management for such use of the monies. The stock misappropriated was four cartons of beer being substituted for 12 wine bottles taken for consumption during the said staff appreciation dinner. The IC found that there was a breach of fiduciary duty on the part of the claimant but that his dismissal was disproportionate to the misconduct complained of. After taking into consideration the fact that the first respondent had served the company for 28 years and his last drawn salary was RM8,195, the IC awarded the first respondent compensation in lieu of reinstatement amounting to RM229,460 (RM8,195 x 28 months) and back wages of RM196,680 scaled back by 50% to RM98,340 (RM8,195 x 28 months x 50%). The IC was of the view that the scaling back of 50% was justified on the ground that the first respondent

employee should bear some responsibility for his misconduct. The applicant company had now sought to quash the award of the IC by way of the instant application for judicial review. It was the company's contention that the IC had acted irrationally by finding that the first respondent had breached his fiduciary duties to the company and then proceeding to hold that the dismissal was without just cause and excuse. The company also submitted that the IC had acted in breach of the doctrine of proportionality when it held the dismissal of the first respondent was too harsh and disproportionate to the severity of the misconduct of the first respondent. The primary issue in this application was whether the award of the IC should be quashed or upheld.

Held, dismissing the application with costs of RM8,000:

(1) It was settled law that in any complaint of unfair dismissal by an employee it was the duty of the IC to firstly determine whether the misconduct complained of by the employer had been established, and secondly whether the proven misconduct constituted just cause or excuse for the dismissal. It was thus not a case where once the IC found that there had been misconduct that fell into the rubric of a breach of fiduciary duty that it should of necessity hold that this dismissal was with just cause and excuse. In other words, not all misconduct would justify a dismissal as there were different gradation of misconduct. As such, the IC had to be satisfied that arising out of the misconduct proved the dismissal was for just cause and excuse having regard to both the severity of the offence and the gravity of the misconduct and considering whether the misconduct had resulted in a complete breakdown of the trust and confidence in the employee concerned. In the present case there had been no element of dishonesty involved on the part of the first respondent as in pocketing the company's funds for personal profit and gain. In being so satisfied, the IC was not usurping the managerial prerogative of the employer but ensuring that the dismissal was justified in the overall circumstance of the case. Consequently, the IC had not acted irrationally in finding that the company had dismissed the first respondent without just cause and excuse inspite of a finding of misconduct (see paras 22–24 & 30–35).

(2) The IC was entitled to ask itself if the dismissal, being the maximum punishment that could be meted out by the employer for the employee's misconduct, was proportionate to the severity of the misconduct the employee was guilty of. Based on the decision of the Federal Court in *Norizan Bakar*, it was incorrect for the applicant company to state as a proposition of law that upon a finding of misconduct as in the breach of fiduciary duty in this case, the punishment of dismissal meted out was within the sole purview of the company and that the IC should not interfere with it. The strictures of non-interference in the punishment to be meted out upon a finding of misconduct in the case of a public sector

employee had no application in a reference under s 20(3) of the Industrial Relations Act ('the Act'). An employer under a reference under s 20(3) of the Act had both the burden of proving the misconduct and also justifying that the dismissal was proportionate in the circumstances of the case (see paras 36–38 & 39–46).

(3) The IC had taken all relevant factors into consideration in arriving at the award with the scaling back of 50% of the back wages and there was no justification to interfere with those findings and the award (see para 47).

[Bahasa Malaysia summary

Dalam bulan Oktober 2006 pemilikan Fajar Supermarket (UP) Sdn Bhd ('Fajar Supermarket') telah diambil alih oleh The Store (Malaysia) Sdn Bhd ('syarikat tersebut'). Pada masa itu, Ang Tin Huat ('responden pertama;) ialah pengurus cawangan Fajar Supermarket di Kuala Kangsar, Perak. Pada 5 Oktober 2007, responden pertama telah ditamatkan daripada pekerjaannya selepas didapati bersalah untuk dua perbuatan salah laku yang serius, iaitu menyalahguna wang tunai syarikat tersebut untuk tujuan salah tanpa memohon dan mendapatkan kelulusan daripada pengurusan ibu pejabat dan melesapkan stok dagangan syarikat tersebut untuk tujuan yang salah. Tuntutan responden pertama bahawa dia telah dipecat secara tidak adil telah dirujuk kepada Mahkamah Perusahaan ('MP'). Keterangan telah dikemukakan di hadapan MP tentang bagaimana wang tunai syarikat tersebut yang dikatakan telah disalahguna oleh responden pertama adalah sebenarnya wang yang dikutip daripada jualan kertas buangan. Responden pertama telah memutuskan untuk menggunakan wang ini yang berjumlah RM976.90 untuk menghoskan makan malam untuk 30 ahli staf pasaraya itu yang telah bertungkus lumus bekerja sepanjang tempoh sebelum Tahun Baru Cina. Walau bagaimanapun, responden pertama tidak memohon atau mendapatkan kelulusan pengurusan untuk penggunaan wang tersebut. Stok yang lesap adalah empat karton arak yang digantikan dengan 12 botol wain yang diambil untuk minuman semasa makan malam penghargaan staf tersebut. MP mendapati terdapat pelanggaran kewajipan fidusiari di pihak penuntut tetapi pemecatannya tidak seimbang dengan salah laku yang diadukan itu. Setelah mempertimbangkan fakta bahawa responden pertama telah berkhidmat dengan syarikat tersebut selama 28 tahun dan gaji terakhirnya adalah RM8,195, MP mengawardkan responden pertama pampasan menggantikan pengembalian jawatan berjumlah RM229,460 460 (RM8,195 x 28 bulan) dan tunggakan gaji semula RM196,680 dikurangkan 50% kepada RM98,340 (RM8,195 x 28 bulan x 50%). MP berpendapat bahawa pengurangan 50% itu adalah wajar atas alasan bahawa responden pertama pekerja sepatutnya bertanggungjawab terhadap salah lakunya. Pemohon syarikat tersebut kini memohon untuk membatalkan award MP melalui permohonan ini untuk semakan kehakiman. Ia adalah hujah syarikat tersebut bahawa MP telah

bertindak secara tidak rasional kerana mendapati responden pertama telah melanggar kewajipan fidusiarinya terhadap syarikat tersebut dan kemudian terus memutuskan bahawa pemecatan itu adalah tanpa sebab dan alasan yang adil. Syarikat tersebut juga berhujah bahawa MP telah bertindak melanggar doktrin keseimbangan apabila ia memutuskan pemecatan responden pertama itu berat dan tidak seimbang dengan keseriusan salah laku responden pertama. Isu utama dalam permohonan ini adalah sama ada award MP patut dibatalkan atau dikekalkan.

Diputuskan, menolak permohonan dengan kos RM8,000:

(1) Ia adalah undang-undang tetap bahawa dalam apa-apa aduan pemecatan tidak adil oleh pekerja ia adalah kewajipan MP untuk pertama sekali menentukan sama ada salah laku yang diadukan oleh majikan telah dibuktikan, dan keduanya sama ada salah laku yang dibuktikan itu merupakan sebab atau alasan yang adil untuk pemecatan. Oleh itu ia bukan suatu kes di mana setelah MP mendapati terdapat salah laku yang merupakan pelanggaran kewajipan fidusiari bahawa ia sepatutnya perlu memutuskan yang pemecatan itu adalah dengan sebab dan alasan yang adil. Dalam erti kata lain, bukan semua salah laku mewajarkan pemecatan kerana terdapat tahap salah laku yang berbeza. Oleh itu, MP perlu berpuas hati bahawa daripada salah laku yang dibuktikan pemecatan itu adalah kerana sebab dan alasan yang adil dengan mengambil kira kedua-dua keseriusan kesalahan dan tahap salah laku itu dan mempertimbangkan sama ada salah laku itu telah mengakibatkan hilang langsung kepercayaan dan keyakinan dalam pekerja berkaitan. Dalam kes ini tiada elemen ketidakjujuran yang terlibat di pihak responden pertama yang mengambil wang syarikat tersebut untuk keuntungan dan perolehan peribadi. Setelah berpuas hati, yang MP tidak merampas prerogatif pengurusan majikan tetapi memastikan pemecatan itu adalah wajar dalam keseluruhan keadaan kes itu. Akibat itu, MP tidak bertindak secara tidak rasional dalam mendapati bahawa syarikat tersebut telah memecat responden pertama tanpa sebab dan alasan yang adil dalam mendapati salah laku itu (lihat perenggan 22–24 & 30–35).

(2) MP berhak menyoal sendiri jika pemecatan itu, yang merupakan hukuman maksimum yang boleh diberikan oleh majikan untuk salah laku pekerja, adalah sesuai dengan keseriusan salah laku pekerja yang bersalah itu. Berdasarkan keputusan Mahkamah Persekutuan dalam kes *Norizan Bakar*, ia adalah tidak betul untuk pemohon syarikat tersebut menyatakan sebagai kenyataan undang-undang bahawa atas penemuan salah laku sebagai pelanggaran kewajipan fidusiari dalam kes ini, hukuman pemecatan yang dilaksanakan adalah dalam skop tunggal syarikat tersebut dan bahawa MP tidak patut campur tangan dengannya. Sekatan tidak campur tangan dalam hukuman untuk dilaksanakan atas suatu penemuan salah laku dalam kes pekerja sektor awam tidak terpakai

dalam rujukan di bawah s 20(3) Akta Perhubungan Perusahaan. Seorang majikan di bawah rujukan di bawah s 20(3) Akta tersebut mempunyai beban membuktikan salah laku itu dan juga menjustifikasikan bahawa pemecatan itu adalah sesuai dalam keadaan kes itu (lihat perenggan 36–38 & 39–46).

(3) MP telah mengambil semua faktor relevan untuk dipertimbangkan dalam membuat award dengan pengurangan 50% untuk tunggakan gaji dan tiada kewajaran untuk campur tangan dengan penemuan dan award tersebut (lihat perenggan 47).]

Notes

For cases on award, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1689–1687.

Cases referred to

Ang Tin Huat v The Store (Malaysia) Sdn Bhd [2014] 1 ILR 85, IC (refd)
Azahari Shahrom & Anor v Associated Pan Malaysia Cement Sdn Bhd [2010] 1 ILR 423, IC (refd)
British Leyland UK Ltd v Swift [1981] IRLR 91, CA (refd)
Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)
Dan Kaffe (Malaysia) Sdn Bhd v Sahlan Sakial [2012] 1 LNS 1335, HC (refd)
Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)
Hongkong Bank Malaysia Berhad v Jaafar Ahmad Thani [2007] 4 ILR 601, IC (refd)
Low Ah Heng v Cartrade Sdn Bhd [2009] ILJU 783; [2009] 4 ILR 295, IC (refd)
Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)
Mohamed Shahrom Abdul Ghani v ExxonMobil Exploration and Production Malaysia Inc [2012] 2 LNS 1312, IC (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
Ngo Kee Ong v Allianz General Insuarance Company (M) Berhad [2013] 2 LNS 1831, IC (refd)
Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 9 CLJ 409; [2013] 4 ILR 477, FC (refd)
Pearce v Foster (1886) 17 QBD 536, CA (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 AMR 433, FC (folld)
Warren Zawawi Hussein v Wagner Global Services (M) Sdn Bhd [2012] 3 ILJ 34, IC (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ (Rep) 298, SC (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753; [1995] 3 CLJ 344, FC (refd)
Zulbahari bin Ladat v CIMB Bank Bhd [2012] 3 ILJ 1; [2012] 2 ILR 225, IC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(3), 30(5)

Ernest Balasingam (Gibb & Co) for the applicant.
Ignatius Ho Woon Choon (Woon Choon) for the first respondent.

Lee Swee Seng J:

[1] The first respondent/claimant was an employee of the applicant/company. He started employment with Fajar Supermarket (UP) Sdn Bhd on 16 November 1979 as an assistant supervisor. He was incharged then of the textile department in the supermarket, earning RM320 per month. He rose through rank and file and was promoted along the way. Like most retail businesses, it waxed and waned with the vagaries of the economy, with the supermarket's ownership changing hands several times and with the concomitant name change as well, reflecting the identity of the new owner. By 1995 the claimant employee had risen to the rank of branch manager of Fajar Retail Enterprise Sdn Bhd (Kuala Kangsar).

[2] In reality he was the branch manager of the 'Fajar Supermarket' in Kuala Kangsar, Perak. The ownership of the supermarket changed hands again with the business being taken over by The Store (M) Sdn Bhd sometime in or around October 2006.

PROBLEM

[3] If he had ever thought that companies may come and go but that he would remain until retirement, he was in for an unanticipated awakening! On 21 September 2007 his routine was ruffled by a show cause and a suspension notice served on him by the company. Whilst various allegations were levelled against him, we need to concern ourselves with just two, for that was what was agreed before the Industrial Court as being material with respect to his dismissal by the company. The reference to the Industrial Court was of course pursuant to s 20(3) of the Industrial Relations Act 1967 ('the IRA').

[4] The company had terminated the service of the employee on the same day as the letter of termination that was served on him on 5 October 2007. The two serious misconduct that the company found the employee guilty of after a domestic inquiry was expressed as follows in the said letter:

A

1. Being the Branch Manager of Kuala Kangsar (Jalan Kangsar) branch, you have misused the company's cash for unauthorised purpose without seeking and obtaining approval from the Head Office Management;

2. You have also misappropriated the company's trading stock for unauthorised purpose; ...

B

[5] However, before the Industrial Court, the company chose not to rely on the evidence adduced during the domestic inquiry held on 4 October 2007 but instead proceeded as if there had been no domestic inquiry and relied purely on the testimony of its witnesses to prove its misconduct and to justify the dismissal. Apparently the audio recording of the domestic inquiry had gone up in flames in a fire at the premises on 21 May 2010.

C

PRAYERS

D

[6] At the Industrial Court, the claimant employee prayed for reinstatement on ground that he had been dismissed without just cause and excuse. The Industrial Court agreed with him and though it held that there was a breach of fiduciary duty on his part, yet the dismissal was disproportionate to the misconduct complained of and awarded on 11 October 2013 as follows to the claimant employee:

E

Compensation in lieu of reinstatement: RM8,195 x 28 months = RM229,460

Backwages of RM196,680 scaled down by 50%: RM8,195 x 24 months x 50% = *RM98,340*

F

Total (before statutory deductions):

RM327,800

G

[7] It is not disputed that the last drawn salary of the claimant was RM8,195. The claimant had served 28 years though the business had gone through several change of ownership culminating with the company having taken over the business some two years before the employee's dismissal.

H

[8] As for the scaling back of 50%, it was justified on the ground that employee must be made 'to bear some responsibility for his misdeeds' and that his employment offence is not insignificant and should therefore be viewed seriously where his contributory conduct was concerned.

I

[9] Against that award of the Industrial Court the applicant company has

now sought by way of a judicial review application to quash it on various grounds considered below.

PRINCIPLES

[10] The approach to be taken by the Industrial Court in a matter coming before it for determination in a reference under s 20 of the IRA is that set out in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 95; [1988] 1 CLJ (Rep) 298 at p 298 by His Lordship Salleh Abas LP as follows:

> When the Industrial Court is dealing with a reference under s 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.

[11] The fact of dismissal is not in dispute; the employee concerned was sacked! The question is whether his dismissal was with or without just cause or excuse. To determine that, one would have to look into the reasons for the dismissal as was stated in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 where His Lordship Raja Azlan Shah CJ (Malaya) as His Royal Highness then was, observed as follows:

> ... Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[12] Not only must the reasons for dismissal be proved by the company but that the dismissal must be fair in the circumstances of the case. In *British Leyland UK Ltd v Swift* [1981] IRLR 91, the Master of the Rolls Lord Denning at p 92 laid down the following test:

> The first question that arises is whether the industrial tribunal applied the wrong test. We have had considerable argument about it. They said: '... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate'. I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered

that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

[13] The two issues that the Industrial Court must address in a reference under s 20 of the IRA have been spelt out clearly by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344 where it was held as follows:

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of reference) is to determine *whether the misconduct or irregularities complained by the management as the grounds of dismissal were in fact committed* by the workman, and if so, *whether such grounds constitute just cause or excuse for the dismissal.* (Emphasis added.)

[14] The same was reiterated in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449 at p 542 (MLJ); p 445 (CLJ) by the Federal Court thus:

> As pointed out by this Court recently in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344, the function of the Industrial Court in dismissal cases on a reference under s 20 is twofold, firstly to determine *whether the misconduct complained of by the employer has been established* and secondly *whether the proven misconduct constitutes just cause or excuse for the dismissal.* (Emphasis added.)

[15] Bearing in mind those broad principles, this court shall now in exercising its powers of judicial review, consider whether the award of the Industrial Court should be quashed or upheld. In exercising its powers in judicial review this court is of course guided by the principles propounded by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433 that had approved the *locus classicus* in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374. His Lordship Edgar Joseph Jr FCJ in his supporting judgment for the majority observed as follows at pp 186–187 (MLJ); pp 469–471 (AMR):

> It is often said that judicial review is concerned not with the decision but the decision-making process (see eg *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC

374, where the impugned decision is flawed on the ground of procedural impropriety.

But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that *such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance*.

In this context, it is useful to note how Lord Diplock defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

> By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development. (Emphasis added.)

[16] As the focus of the arguments of counsel for both sides has been on the issue of *Wednesbury* unreasonableness and proportionality, this court shall confine its discussion to those two issues.

Whether the Industrial Court had acted irrationally when having held that the employee had breached his fiduciary duty to the applicant company, it nevertheless proceeded to hold that the dismissal was without just cause and excuse

[17] The learned chairman of the Industrial Court had, after sieving through the evidence adduced before it, concluded that there was a breach of fiduciary duties on the part of the claimant on both counts of misusing the company's cash for unauthorised purpose without seeking and obtaining approval from the head office management and that of misappropriating the company's trading stock for unauthorised purpose.

[18] The sum involved was RM976.90 that was spent on the dinner. The source of the money was from the sale of cardbox and carton boxes ('paper waste') from the supermarket. The subject that the said sum was spent on was a dinner for some selected staff of the supermarket who had served sacrificially during the period prior to the Chinese New Year, working longer hours and even until midnight on some days. To be exact it was for some 30 out of the 100 staff in the branch supermarket. The stock misappropriated was four cartons of beer being substituted for 12 wine bottles taken for consumption for the said dinner. The strange thing was that the value of the beer substituted with was RM482.92 was more expensive than the wine substituted for at RM370 such that the supermarket did not lose money but instead made a small profit.

[19] The company had not framed the misconduct of the claimant as that of a breach of fiduciary duties but nevertheless the Industrial Court had found the misconduct to be one under the broad framework of a breach of fiduciary duties. This court would not quibble with the label that has been applied for it is not unreasonable for the Industrial Court to have so categorised the misconduct having found as a matter of fact that the specific acts complained of have been proved. In this respect the following dicta of His Lordship Gopal Sri Ram JCA (as he then was) in *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 at p 606 bears repetition:

> First, the learned judge erred in holding that the Industrial Court had decided the case dehors the pleadings. The case was adjudicated upon an unpleaded point. All the facts relevant to the point at issue had been pleaded. It is only the legal result that had not been pleaded. It is not necessary, even at common law, to plead the legal result flowing from a set of pleaded facts. There had been written argument about the legal result. Since all the relevant evidence was before him, the learned chairman acted with propriety in holding that there had been a breach of the implied term in question.

[20] The court is not unaware of the special nature of the relationship between a master and his servant as enunciated by Lord Esher MR long ago in *Pearce v Foster* (1886) 17 QBD 536 Lord Esher MR as follows:

> The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss. The relation of master and servant implies

necessarily that the servant shall be in a position to perform his duty and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him.

[21] Much has changed in the workplace since the late 1800s when the case was decided. With the change in the sophistication of skills and in keeping in tandem with the concept of empowerment in the workplace, and indeed of the transformation of the structure of chain of command from a single layer of direct report to and supervision by the master being the owner of the business, to multiple layers in the chain of command and reporting, the stress has been on performance and accountability rather than pure absolutist obeisance.

[22] The question is whether the company's dismissal of the claimant was for just cause and excuse in the light of the breach in fiduciary duties on the part of the claimant. The specific misconduct that constituted a breach of fiduciary duties must be scrutinised when the sacking of an employee is the subject of the judicial review exercise. Evidence was led before the Industrial Court that different branches of the supermarket appeared to have different treatment of the monies collected from what would otherwise have been paper waste to be disposed of. Some branches used the monies from the sale of the paper waste to pay the collectors and cleaners. Some donate it to charity or use it for paying for souvenirs and prizes for annual staff party and dinner. Others would bank it into the company's account or use it for the collective welfare of the staff. Whilst different branches have different approaches on how proceeds from the sale of the paper waste are to be applied, the Industrial Court had nevertheless concluded that in this particular branch where the claimant was the manager, the proceeds should have been banked into the company's account and permission of the senior management ought to have been obtained for the spending of the company's monies for the dinner held to show appreciation to some selected staff of 30 persons or so.

[23] It is not for this court to delve into the sufficiency of the evidence that had led the Industrial Court to come to this finding unless there is absolutely no evidence whatsoever for the conclusion arrived at. This is inspite of the fact that evidence was led that the dinner had been an annual affair of the branch and that it was done during the time of the previous management who had no qualms or quarrel with the claimant's conduct in organising an annual dinner to show appreciation for some staff for the sacrifice they had put in to contribute to the success of the branch especially in working extended hours during the Chinese New Year sales period.

[24] One can appreciate that different companies have different levels of management where a branch is concerned or for that matter 'micro-management'. In a company that empowers its branch manager with a measure

of discretion, an annual dinner of this nature would be something that a branch manager would just merely keep the management posted and disclose the amount spent and the source of the funds. As for the exchange of wine for beer, it is something that would attract at most a slap on the wrist. Understandably such a practice, though once off, might lead to an abuse of the system of stock control and compromise the integrity of the stock keeping. However it was not such a breach that had resulted in a shortage of wine for the moment leading to customers being inconvenienced or that it was so disruptive as to throw the record of replenishment and removal of trading stock into dire disarray. There is a margin of error in an enterprise of this nature where some buffer is allowed without betraying trust.

[25] I agree with Mr Ignatius Ho, learned counsel for the claimant, that the dinner was for the benefit of staff and not for the claimant's personal profit or gain. It was not carried out clandestinely for there was a management committee that organised the appreciation dinner comprising of the claimant as the branch manager, the assistant branch manager, the assistant admin manager, the assistant sales manager, two senior supervisors and a supervisor of accounts. The benefit of the staff was indirectly the benefit of the company. If it was a misconduct, it was committed during the time of the previous management before the claimant received on 16 May 2007 his notice of transfer of his employment to the current company though the change of shareholding to the current company had been earlier. There is merit in Mr Ignatius Ho's submission on behalf of the claimant that any fiduciary duties owed were owed to the previous management Fajar on 8 March 2007 when the dinner was held and not to the applicant. Fajar did not complain about either the dinner or the exchange.

[26] Granted different companies would have different management styles and even different degree of control over branch managers. If at all he had done something gravely wrong, it is a misconduct that can be prevented from recurring by a stern and serious warning letter setting out clearly the procedure required before such a dinner can be approved and that no trading stock of the company may be used, and then to be substituted for later, not even for the staff benefit. It is not a misconduct of the degree that would destroy completely the ingredient of mutual trust and confidence that is essential in a fiduciary relationship. It is the type of misconduct that misses the mark by a bit and ranks the lowest of the low where its gravity is concerned.

[27] There would of course be cases where a breach of fiduciary duty would lead to the destruction of the ingredient of mutual trust and confidence so vital to the proper working relationship between an employer and employee as was the observation made by the same learned chairman in *Azahari Shahrom & Anor v Associated Pan Malaysia Cement Sdn Bhd* [2010] 1 ILR 423 at p 436

where it was held as folows:

> **[46]** It is trite that the association between employer and employee out of necessity is fiduciary in nature. There has to be mutual trust and confidence that one would deal with the other in all fairness and rectitude over the rights and obligations flowing between the parties under the employment agreement. If one does an act or commits an omission which is inconsistent with that fiduciary relationship then that act or omission will be mala fides. This principle has equal application as against the employer and the employee in their respective positions viz the employment relationship between them.

[28] A breach of fiduciary duty may arise from a myriad of work relationship between an employer and an employee arising as it does from an assortment of assignments given to the employee and the expectations that flow from it. The learned author BR Ghaiye in his text *Misconduct in Employment*, Chapter XIX at pp 650–651 put it this way:

> The relation between an employer and an employee is of fiduciary character. The word 'fiduciary' means belonging to trust or trusteeship. It means that whenever an employer engages a worker he puts trust that the worker will faithfully discharge the service and protect and further the interest of the employer. A fiduciary relationship exists between employer and employed: (a) whenever the former entrusts the latter with property, tangible or intangible, eg., confidential information and relies upon the other to deal with such property for the benefit of the employer, or for purposes authorized by him, and not otherwise, (b) whenever the employer entrusts the employee with a task to be performed, eg, the negotiation of a contract, and relies on the servant or agent to procure the best terms available ...

[29] Applying the above concept to the context of this case on the issue of the hosting of a staff dinner using company's funds without prior approval of higher management and the exchange of the wine for the beer bottles, the learned chairman's astute analysis of the evidence in *Ang Tin Huat v The Store (Malaysia) Sdn Bhd* [2014] 1 ILR 85 goes like this:

> [39] ... but was delivered to the Supermarket some days after the dinner. I will refrain from going into the nitty gritty of the evidence that was led at trial on this issue. Sufficient to state that the claimant acknowledged that such an exchange took place. However, he (the claimant) stated that it was not him who had made the exchange but a subordinate; and that too on the authority of the above said 'Management Committee'. In other words, he sought to absolve himself of any wrong doing.

The learned chairman further noted:

> [42] ... No one in such a position could or should be allowed to absolve himself of accountability when it comes to the use of the financial assets or physical property belonging to the company ... The simple expedience of pushing or attempting to push responsibility to a so-called 'Management Committee' was a futile attempt to avoid ultimate responsibility. Whether or not such a body existed under the old 'Fajar Management' does not absolve the claimant from doing the basic thing of

seeking and more importantly, securing permission from upper management of the current ownership to expend company funds on the said dinner. That he did not do so is clearly wrong from the perspective of the fiduciary relationship existing between an employer and an employee in such situations.

[30] Having found that there was misconduct in that there was a breach of fiduciary duty on the part of the claimant, the Industrial Court proceeded to consider whether the punishment of dismissal would be fair and reasonable in the circumstance of case. There was no element of dishonesty as in pocketing the company's funds for personal profit and gain. The company's funds from the sale of paper waste were used for an annual company dinner that he was accustomed to organise to reward the staff of the company without prior clearance from higher management. The new management was of course entitled to set out their new procedure where placement and use of funds from sale of paper waste was concerned. There was no evidence that this has been communicated clearly whether in writing or otherwise to the claimant after the takeover of the business by the company. Be that as it may I am not inclined to disturb the findings of the Industrial Court on the breach of fiduciary duty on the part of the employee, being a conclusion that may justifiably be supported from the evidence adduced. The graver question taking into consideration the gradation in the gravity of the offence in this case, persuaded the chairman to proceed as follows where the proper punishment was concerned at p 20:

> [46] ... There was no evidence of any previous misdemeanours or delinquency on the part of the claimant; and thus he appeared to have had a good record of employment with the company. The misconduct that has been shown against him was by no stretch of the imagination beneficial, advantages or of profit to him personally, apart perhaps for being perceived as a benevolent boss by the selected 30 who attended the dinner concerned.

[31] In other words, the Industrial Court has to be satisfied on both counts, ie that the misconduct has been proved and that the dismissal is with just cause and excuse. It is thus not a case where once the Industrial Court finds that there has been misconduct that falls into the rubric of a breach of fiduciary duty then it must of necessity hold that the dismissal is with just cause and excuse. The Industrial Court must evaluate if the nature of the misconduct is of such severity that would justify the dismissal of the employee; for any dismissal of an employee must be for just cause and excuse. That approach is consistent with the Industrial Court, being a court of equity, good conscience and dealing with the substantial merits of the case, thus being perfectly entitled to take into consideration if the dismissal is reasonable in the circumstances of the case.

[32] Not all misconduct would justify a dismissal as there are different gradation of misconduct. Some misconduct would justify a warning letter, others a withholding of annual increment and others still a demotion. Under

the Industrial Court regime, it is only concerned and would exercise jurisdiction if the employee is a workman within the meaning of the IRA and if the workman has been dismissed or even constructively dismissed.

[33] Whilst it is true that if the misconduct is not proved then invariably the dismissal would be without just cause and excuse; the converse is not necessarily true that if the misconduct has been proved then invariably the dismissal must be for just cause and excuse. The Industrial Court must be satisfied that arising out of the misconduct proved the dismissal must nevertheless be for just cause and excuse having regard to both the severity of the offence and the gravity of the misconduct and considering whether the misconduct had resulted in a complete breakdown of the trust and confidence in the employee concerned.

[34] Such was the approach taken by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 757; [1995] 3 CLJ 344 at p 347 where His Lordship Mohd Azmi bin Hj Kamaruddin FCJ observed as follows:

> On a reference by the Minister under s 20 (3) of the Industrial Relations Act 1967, the Industrial Court by its Award No 305/90 dated 15 November 1990 found Wong Yuen Hock, an insurance claims manager of twelve years standing in the employment of Hong Leong Assurance Sdn Bhd had been dismissed without just cause or excuse on the sole ground of the failure of the employer to hold a domestic inquiry as required under the terms of Wong's contract of employment. In lieu of reinstatement the Court had awarded him compensation but the quantum was limited to one year's salary, totalling RM43,200 by reason of his contributory act of misconduct.

At p 753 (MLJ); p 352 (CLJ) His Lordship continued:

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal ...
>
> ... In this particular case, it was clear from the award of the Industrial Court, that the reason given by Hong Leong for the dismissal of Wong was based on the irregularities in the sale of the two motor car wrecks which the Industrial Court held to be a gross dereliction of Wong's duties. After being satisfied that Wong did commit the acts complained of, the Industrial Court ought to have gone further and determined whether such gross dereliction of duties constituted just cause or excuse for the dismissal ...

At p 765 (MLJ); p 354 (CLJ) it was held:

> ... Thus, even where there was a breach of contractual or statutory obligation to hold an inquiry, the Industrial Court should proceed to determine on the merits firstly,

> whether the misconduct complained of was in fact committed by the employee, and secondly whether the nature and extent of the misconduct could constitute just cause or excuse for the dismissal ...

Further at p 767 (MLJ); p 356 (CLJ) it was clarified that:

> It was therefore the function of the Industrial Court in this particular case to determine on the available evidence whether Wong had misconducted himself by his involvement in the sales of the two motor car wrecks against the unwritten rules of Hong Leong which prohibited its staff from such activity. Since the answer was in the positive, the next question for the Court to ask itself was whether such misconduct constituted a just cause or just excuse for the dismissal? ...

Then at p 769 (MLJ); p 358 (CLJ), it was concluded as follows:

> ... To avoid further delay in the disposal of this case, there appeared to be hardly any reason to quash the other parts of the award regarding compensation in lieu of reinstatement

[35] In being so satisfied, the Industrial Court is not usurping the managerial prerogative of the employer but ensuring that the dismissal is justified in the overall circumstance of the case. I cannot see how in finding that the company here had dismissed the employee without just cause and excuse inspite of a finding of misconduct, the Industrial Court had acted irrationally or that it had taken into consideration irrelevant factors or failed to take relevant factors into consideration. I was therefore not constrained to disturb the finding of the Industrial Court that the dismissal was without just cause and excuse having regard to the kind of misconduct made out in the circumstances of the case.

Whether the Industrial Court had acted irrationally and in breach of the doctrine of proportionality when it held that the dismissal of the employee was too harsh and disproportionate to the severity of the misconduct of the employee

[36] The Industrial Court has been applying the doctrine of proportionality in determining if a dismissal in a reference under s 20(3) of the IRA is for just cause and excuse. In *Warren Zawawi Hussein v Wagner Global Services (M) Sdn Bhd* [2012] 3 ILJ 34 at p 49 Mary Shakila G Azariah, the learned chairman, opined as follows:

> There must be 'proportionality' between the severity of the misconduct and be discipline imposed or dismissal of the Claimant must be reasonable in the circumstance of the case. To constitute just cause 'dishonesty' must cause a 'breakdown' in the employment relationship that is irrevocable. Applying these postulates to the case at hand the Court is baffled as to how what the Claimant did could cause a damage to the employment relationship that can never be repaired. The Claimant's dismissal on the facts and evidence is too grievous for the proven conduct of the Claimant.

[37] Recently the Federal Court has clearly approved the application of the doctrine of proportionality in determining whether the dismissal of a workman can be upheld in a reference under s 20(3) of the IRA. In other words in determining whether the dismissal was for a just cause and excuse, the Industrial Court is entitled to ask itself if the dismissal, being the maximum punishment that could be meted out by an employer for the misconduct of its employee, is proportionate to the severity of the misconduct that the employee is guilty of. In the event that it is not, the Industrial Court would be perfectly justified in holding that the dismissal was without just cause and excuse in that in was disproportionate to the gravity of the misconduct and in assessing compensation, the Industrial Court may take into consideration the contributory conduct of the dismissed employee.

[38] The Federal Court has placed the doctrine of proportionality in such cases beyond a pale of doubt in the relevant dicta of His Lordship Raus Sharif PCA in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605 at p 622; [2013] 9 CLJ 409 at p 429; [2013] 4 ILR 477 as follows:

> [34] This point has been made earlier but deserves to be reiterated. A public officer who wishes to challenge any allegation of misconduct against him for which punishment has been imposed can only do so by challenging it in the High Court by way of judicial review. It is pertinent to note that the said public officer cannot challenge the punishment imposed, but only the allegations preferred against him. This clearly explains why the court must not substitute its own view as to what is the appropriate penalty for public officer's misconduct, for the view of the particular disciplinary committee as rightly held by the minority view in *Tan Teck Seng* and the Federal Court in *Ng Hock Cheng*.
>
> [35] However, the same cannot be true with regard to the dismissal cases involving private sector employees. Any complaint of unfair dismissal by an employee has to be dealt with under the IRA. The duty of the Industrial Court in dealing with such cases had been laid down in *Hong Leong Assurance* and *Milan Auto*, ie, first to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. *In deciding whether the proven misconduct would constitute just cause or excuse, the Industrial Court is fully endowed with the power to consider whether the misconduct proved warrants the punishment of dismissal*.
>
> [36] Thus, in reference to the questions posed to us, we are of the view that *the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under* s 20(3) of the IRA. *We are further of the view that the Industrial Court in exercising the aforesaid functions can rely to its powers under* s 30(5) of the IRA *based on the principle of equity, good conscience and substantial merit of the case*.
>
> [37] Clearly, the reference by the Federal Court in *Milan Auto*'s decision to the 'two fold' test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is

clear reference to *the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under* s 30(6) *in making an award* which provides:

> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s 20(3).

[38] Pertinent to note that, under the IRA itself there is an *inbuilt mechanism through Item 5 of the Second Schedule to consider the doctrine of proportionality of punishment*. Item 5 provides as follows:

> *Any relief given shall take into account contributory misconduct of the workman*.

[39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, *the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned*.

[40] As to what is the exact test to be used in deciding whether the proven misconduct constitutes a just cause or excuse for dismissal is a non-issue. Whether it is the reasonable employer's test as adopted by *British Leyland* or the reasonable man test as laid down by the Federal Court in *Hong Leong Assurance*, the Industrial Court's decision on that issue is always open to judicial review. (Emphasis added.)

[39] Thus based on the decision of the apex court above, it is incorrect for learned counsel for the applicant company to state as a proposition of law that upon a finding of misconduct and in this case, in the nature of a breach of fiduciary duty, the punishment of dismissal meted out is within the sole purview of the company and that the Industrial Court should not interfere with it. Whilst the same may be true for an employee in the public sector whose only recourse is for judicial review on whether or not there is misconduct made out; in the private sector the Industrial Court is specially charged with the task of ensuring that the punishment fits the misconduct complained of and that not every misconduct would justify dismissal.

[40] The strictures of non-interference in the punishment to be meted out upon a finding of misconduct in the case of a public sector employee has no application under the IRA in a reference under s 20(3). Thus the dicta below in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 must be confined to cases of a dismissal of a public officer outside the scheme of the IRA. At p 406 His Lordship Peh Swee Chin FCJ observed thus:

> [1c] In this respect, the *majority judgment* of the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor could not stand* with the instant decision of the Federal Court. The *dissenting judgment* in *Tan Tek Seng v*

> *Suruhanjaya Perkhidmatan Pendidikan & Anor* was, therefore, right in restating the principle that: the test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for the court to say. The court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[41] The whole scheme and structure of managing industrial relations and disputes for the private sector under the IRA is that the doctrine of proportionality is applicable in any consideration as to whether dismissal is for just cause and excuse. Thus an employer under a reference under s 20(3) of the IRA has both the burden of proving the misconduct and also justifying that the dismissal is proportionate in the circumstances of the case.

[42] The Industrial Court in the present case appeared to have this in mind in scaling back the back wages by 50% when it reasoned as follows in *Ang Tin Huat v The Store (Malaysia) Sdn Bhd* [2014] 1 ILR 85:

> [67] ... Although not shown by the company to this court to be grave enough to warrant dismissal in this instance, his transgressions as an employee is sufficiently noteworthy to be taken into account in relation to the measure of recompense to be ordered. The claimant, in all good conscience, must be made to bear some responsibility for his misdeeds. To allow him to go 'scot-free' would send the wrong message to would-be offenders of this type of transgressions. The claimant's acts as an employment offence is not insignificant and should therefore be viewed seriously. *Under the circumstances and in view of the claimant's contributory conduct this court sees fit to rescale downward the award for backwages under this head to the extent of 50%.* (Emphasis added.)

[43] Viewed in its proper perspective and proportion, the action of the employee here was clearly flippant and foolish but should he be fired forthwith for it? Though the amount spent would perhaps have been approved in any way had he formally requested for it to show appreciation for the staff that had worked sacrificially and selflessly, nevertheless there is a point to be made that such a practice of taking money at source from the sale of paper waste might be open to abuse and might promote a lack of transparency and accountability. The same would apply to the exchange of wine for beer with no appreciable or discernible loss or hardship caused to the company but then again such a practice would not be conducive in promoting and enhancing good corporate governance and accountability. Depending of the DNA of the company especially after a takeover by new shareholders, the new owners are perfectly entitled to set the tone in terms of timely disclosure of all monies realised from sale of the stocks, be it from the waste in the paper and carton boxes and the truth in the tally of the trading stocks without any unauthorised replacement of it though the end result is no loss in monetary terms but in fact a gain here in the sale of the beer sponsored by some clients.

[44] It was thus reasonable and proper having taken all relevant factors into consideration for the Industrial Court to have come to the conclusion that:

> the termination appears excessively harsh, unjust and disproportionate, even taking into consideration the overall fidelity owed by the Claimant to the Company in the general scheme of things.
>
> That there were other sanctions available in the *'armoury of punishment'* open to the Company is trite. That they chose the ultimate one and applied it against the Claimant in this instance was somewhat draconian, to say the least. Surely after 28 years of loyal service the Claimant deserved a modicum of mercy.

[45] Here both the mistake made and the misconduct committed are of such a minuscule measure deserving of a modicum of mercy at least. Hence the scaling back of 50% from the back wages amounting to RM98,340. It is of course no small sum; sufficient to buy a single-storey link house in Kuala Kangsar! It is a painful price to pay for a breach of fiduciary duty in two foolish acts of the employee: using funds from sale of carton boxes to the tune of about RM900 for a dinner organised to the benefit of some staff of the company and of exchanging some wine for beer bottles so as to make glad the hearts of the hard working staff. However it can be justified after taking into consideration the aggravating factors in the contributory conduct of the claimant.

[46] Here there is no finding of dishonesty or deception practised on the company unlike in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 9 CLJ 409; [2013] 4 ILR 477 where at p 624 (MLJ); p 497 (CLJ), His Lordship Raus Shariff PCA made reference to the dishonest declaration of the employee with respect to his directorship and how that had led to a breakdown of trust and confidence reposed on him by the company:

> [42] ... We are of the view that the Industrial Court had directed its mind only to factors favouring the appellant, disregarding the very important consideration that the appellant was holding the position as a Special Assistant to the chairman of the respondent and the appellant's misconduct had destroyed the trust and confidence that the respondent would have placed on him. The fact is that the appellant was dishonest when he declared in writing that he was not serving on the board of directors of any company when he was, in fact, at all material time found to be serving on the board of directors of another company ...

[47] I cannot see how the award with the scaling back of 50% in the backwages can be said to be one arrived at unreasonably or that it was excessive or disproportionate to the misconduct committed. The reverse would be true that the dismissal was totally disproportionate to the misconduct committed and it was as if a machete had been used to kill a fly. The Industrial Court had taken all relevant factors into consideration in arriving at the award with the

scaling back of 50% of the backwages and this court in exercising its supervisory jurisdiction saw no justification to interfere with the findings and the award.

Whether the Industrial Court had acted irrationally in taking into consideration the 28 years of service of the employee with the company when in reality the employee had served only two years with the company after it had taken over the company from Fajar Retail Enterprise Sdn Bhd

[48] Perhaps learned counsel for the applicant had forgotten that it was part of the statement of agreed facts duly signed by both the solicitors for the claimant and the company at the Industrial Court proceedings that the claimant had served 28 years with the company, having served with Fajar Retail Enterprise Sdn Bhd at the commencement of his service and then with various owners of the supermarket until it was taken over by the applicant company some two years before the dismissal.

[49] It is a principle of employment jurisprudence that one's term of service with a previous entity is recognised for purpose of remuneration and reward where seniority is concerned and even for recompense where sacking is concerned in the context of a business takeover as is the case here. To put beyond peradventure, the letter dated 16 May 2007 from Fajar Retail Enterprise Sdn Bhd to the claimant of transfer of employment to the new entity in the company says it all. It is reproduced below:

> TRANSFER TO THE STORE (MALAYSIA) SDN BHD
>
> Pursuant to the internal reorganization and rebranding exercise that take effect from 16th May 2007, the business operations of all 'Fajar' outlets under Fajar Retail Enterprise Sdn Bhd will be consolidated into The Store (Malaysia) Sdn Bhd, both of which are wholly-owned subsidiaries of The Store Corporation Berhad.
>
> Accordingly as provided under Clause 22 Transfer of your employment agreement, effective from same date, you will be transferred to The Store (Malaysia) Sdn Bhd Kuala Kangsar (Jalan Kangsar) with your physical location of workplace remaining the same, *no loss of seniority and years of service would be treated as continuous from Fajar Retail Enterprise Sdn Bhd*.
>
> We trust you would continue to put in your best effort to the Company at all times.
>
> Yours faithfully,
>
> FAJAR RETAIL ENTERPRISE SDN. BHD.
>
> Sgd
>
> ----------
>
> Dato' Tang Yearn Soon
>
> Group Managing Director

I hereby confirm my acceptance of the above transfer and shall comply with the policies and guidelines of the company.

Sgd

Date: 13/06/07

Name: ANG TIN HUAT

NRIC: 551017-08-555

[50] How else is an employee to understand the expression '... no loss of seniority and years of service would be treated as continuous from Fajar Retail Enterprise Sdn Bhd.' other than that in the event of termination of his employment, his total years of continuous service in the supermarket is to be taken into account? Both having agreed to that fact in the statement of agreed facts and having stated in the letter of transfer the 'no loss in seniority and years of service' and having been given the assurance of 'service being treated as being continuous', the company is estopped from contending and contesting otherwise.

[51] The Industrial Court, in taking into account both the requirements of equity and good conscience, was entirely justified in factoring in the 28 years of continuous service in the calculation of compensation in lieu of reinstatement.

Whether the Industrial Court had acted irrationally when under the letter of appointment of the employee, the company may dismiss the employee for any serious misconduct in having breached the company's regulations

[52] The managerial prerogative of an employer to dismiss an employee for any serious misconduct should never be in doubt. The question is what is the particular regulation complained of and whether a breach of such a regulation identified could amount to a serious misconduct.

[53] It is not challenged that the organising of such an appreciation dinner for selected staff of the company was something that had been done by the claimant as a branch manager of the company's branch for quite a while under the old management with no quibble by the previous management. The new management seemed to have taken umbrage with such a conduct. However not only was this dinner organised during the term of the previous management but that none of the witnesses called by the company could point to any particular regulation, by-law, written policies, code of conduct or standard operating procedure that had been breached. The person identified as the

senior manager that the employee should refer and report to was not called to testify.

[54] That should come as no surprise as, by and large, most companies operating a retail business like that of this company would empower a branch manager to exercise his discretion with respect of an annual appreciation meal of this nature especially when there has been a history to it; some antecedents afore and awareness on the part of the previous management that had apparently allowed if not approved it. If at all such an initiative should be frowned upon or even prohibited without prior permission of the higher management, then one would have expected something in writing from the management concerned whether by way of incorporation into some regulations or by-laws for a branch manager to follow. The permutations of conduct of a branch manager enter into the realm of possibilities such that it is quite impossible to list down all the conduct that would possibly be prohibited with the result that anything that is not prohibited is permitted unless it falls into that province of implied duty to act or not to act in a particular manner, in good faith consistent with being faithful in the discharge of one's fiduciary's duty as an employee to an employer.

[55] Even assuming that such a conduct is within the prohibition of the duty to act in good faith, the question is whether such a misconduct is serious enough to justify dismissal. Surely it is not for a company to be the sole decision-maker as to what is serious misconduct that would justify a dismissal for if it be so, there would then be no need for the Industrial Court in a reference under s 20 of the IRA arising out of an employee's complaint of a dismissal without just cause and excuse to then be guided by the test as reiterated in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 at pp 542–543; [1995] 4 CLJ 449 at p 455 where His Lordship Mohd Azmi bin Kamaruddin FCJ held that the test is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.

[56] The same approach may be applied to the exchange of wine for beer to gladden the hearts of the staff and to show gratitude for their fine effort. It would fall distinctly into the domain of the *de minimis non curat lex* where the disquietude is not the distortion in the trading stock but the disclosure that such a step has been taken albeit for the consumption of the staff selected for the celebration conducive for camaraderie among the staff.

[57] Whilst it may be open to argument that where cash is concerned no amount, no matter how small, can ever be considered as coming within the realm of the *de minimis* classification, yet where the money is spent on food in a dinner hosted for staff of a company, one would be permitted to look into the amount spent per staff. When divided by the total amount spent of about RM900 to fete some 30 employees, the amount spent for food per employee is hardly RM30! It would not be irrational or unreasonable to permit an exception to the general rule that whilst every single cent must be accounted for, yet where some money is spent on food for an employee and that only once a year, one may be pardoned to have spent it without prior permission of the company being properly obtained.

[58] A company with a strict culture may properly conclude that such an action was presumptuous and punishable, but is it punishable with dismissal? Having followed the analysis of the Industrial Court in coming to its conclusion of the lack of justification for the dismissal, I see no good reason to interfere with its award. Having found the dismissal to be without just cause and excuse, it is for the Industrial Court to determine the compensation that would be reasonable for the unjustified dismissal. The scaling back of the back wages by 50% resulting in a much smaller compensation cannot in the circumstance be said to be unreasonable or disproportionate to the gravity of the misconduct or that it was arrived at without considering relevant factors or that as a corollary it was arrived at by considering irrelevant factors. One must always bear in mind the broad discretion reposed with the Industrial Court under s 30(5) of the IRA. It is more than sufficient punishment for the claimant below to have proceeded to host the dinner without the prior permission of the company having being properly obtained and for having replaced the wine with beer from the company's stock so that the staff may celebrate and have some cheer.

[59] In *Dan Kaffe (Malaysia) Sdn Bhd v Sahlan Sakial* [2012] 1 LNS 1335 Gunalan a/l Muniandy JC had to consider whether being asleep on one occasion during work was a misconduct serious enough to justify dismissal taking into consideration the employee was suffering from asthma on that day in question. His Lordship reasoned as follows:

> [7] On the admission by R that he had in fact slept on the job as alleged, the ICC found that misconduct on a prima facie basis had been proven against him. However, based on A's explanation that he was suffering from asthma on the day in question and was thus, drowsy and weak, the ICC found that the punishment of dismissal was disproportionate to the said misconduct. The dismissal was, thus, on this score, without just cause or excuse.

[8] ... (1) It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the tribunal to see if there are errors of law on the face of the record;...

[13] A's case was that R had, from the facts as above committed serious misconduct that warranted the harsh penalty of dismissal. He had allegedly by his conduct compromised the safety of the whole operation at A's premises and put A at risk of massive losses if anything untoward were to occur ...

[16] In this case, the ICC, in my view, adopted the correct approach in dealing with the reference under s 20 of the Act which was wholly consistent with the two-fold function as enunciated in *Milan Auto Sdn Bhd*. She rightly considered firstly, whether the misconduct complained of had been established and secondly, whether the proven misconduct constituted just cause or excuse that warranted the penalty of dismissal ...

[19] For the above reasons, I held that the ICC in arriving at her conclusion that the severe penalty of dismissal imposed on R was disproportionate to the misconduct complained of had taken into account relevant and undisputed facts ...

[21] As for compensation, the ICC awarded a global sum of RM40,000.00 instead of reinstatement or backwages on the ground that the Respondent himself had contributed to his predicament by not reporting earlier to the management regarding his illness. This was not an unreasonable or unjustifiable award and ought to be maintained as the amount of compensation to be awarded is very much at the discretion of the IC under s 30 of the IRA *Hotel Jaya Puri Bhd v National Union of Hotel Bar & Restaurent Workers & Anor* [1981] 1 ILR 270; [1980] 1 MLJ 609 (FC).

[60] The applicant company had referred to another award of the Industrial Court by the same chairman Frederick Indran XA Nicholas in *Ngo Kee Ong v Allianz General Insuarance Company (M) Berhad* [2013] 2 LNS 1831 where the employee had misled the company by way of false documentation in representing that he was no longer an agent with a rival insurance company AIA when it fact he still was. It was a clear breach of the company's written policy and the employee had clearly placed himself in a position of a conflict of interest, thus justifying the company dismissing him. In upholding the decision of the company made after a domestic inquiry, the Industrial Court held as follows:

By a careful scrutiny of the evidence taken in its entirety, based on equity, good conscience and on the substantial merits of the case it is the finding of this Court that the Company has established, on a balance of probabilities, the appropriateness of the Company's action against the Claimant. The Claimant has himself, in effect, admitted to the allegations of wilful misconduct through a conflict of interest position notwithstanding that he had initially denied it; and has by this, *shown a betrayal of the trust and confidence reposed in him by the Company. It is the ruling of this Court that the Claimant has indeed acted in conflict of interest with his duties and with the loyalty that he owed to the Company as his employer. It was therefore unsafe and*

indeed unreasonable to expect the Company to continue his employment (see the cases of Pantas Cerah Sdn Bhd v Lau Boon Seng [1999] 3 ILR 216; *SGS-Thomson Microelectronics Sdn Bhd, Muar v Ibrahim Ahmad* [1997] 3 ILR 1123; and *HK Ananda Travel (Malaysia) Sdn Bhd v Khor Seng Kear* [2003] 3 ILR 1280). (Emphasis added.)

[61] The misconduct committed was so serious in nature as justifying a dismissal and this was so even though the employee had served the company for 13 years. There was the element of dishonesty in misleading the company on the part of the employee when he well knew that he was still an active agent for AIA.

[62] The applicant company submitted that the learned chairman was being inconsistent when he had in an earlier award in *Mohamed Shahrom Abdul Ghani v ExxonMobil Exploration and Production Malaysia Inc* [2012] 2 LNS 1312 upheld the decision of the company to dismiss the employee but failed to do so in the present case. It is axiomatic that each case must be decided on its own merits and in *Mohamed Shahrom* there was the dishonest concealment of truth about a third party to whom a contract for RM3.55m was finally awarded. The learned chairman observed as follows:

> By a careful assessment of the evidence taken as a whole, grounded upon equity, good conscience and the substantial merits of this case, it is the finding of this Court that the Company has established, on a balance of probabilities, the aptness of the Company's action against the Claimant. *The Company had tangible, logical and credible grounds upon which they could infer the Claimant's guilt for his misconduct; and this in turn sustained their contention that they had lost all trust and confidence in the Claimant as an employee*. The Claimant's established lack of ethical responsibility in breach of the Company's acknowledged philosophy upon the subject points directly to the state of his integrity as an employee. I venture to add that integrity here means just not being corrupt. May I be so bold as to say that it is a concept of reliability of actions, morals, procedures, methods, values, expectations and outcomes. In ethics, integrity is the honesty, truthfulness and accuracy of dealings; all unfortunately and conspicuously found wanting in the Claimant's conduct in this case. *It was therefore unsafe and indeed unreasonable to expect the Company to continue his employment*. (I take comfort in this ruling from the authority of the following cases: *Pantas Cerah Sdn Bhd v Lau Boon Seng* [1999] 3 ILR 216; *SGS-Thomson Microelectronics Sdn Bhd, Muar v Ibrahim Ahmad* [1997] 3 ILR 1123; and *HK Ananda Travel (Malaysia) Sdn Bhd v Khor Seng Kear* [2003] 3 ILR 1280).

[63] Far from being inconsistent and contradicting himself, the learned chairman had in the forefront of his mind the serious nature of the misconduct in *Mohamed Shahrom*'s case such that his 22 years of service would not be a mitigating factor upon a finding of a breach of procurement procedure displaying a lack of integrity on the part of the said employee, thus justifying his dismissal.

[64] Learned counsel for the company, Mr Ernest Balasingam, also referred to another award of the said chairman in *Zulbahari bin Ladat v CIMB Bank Bhd* [2012] 3 ILJ 1; [2012] 2 ILR 225 where an employee who unlawfully and in breach of specific customer service user guide issued by the bank and further in excess of authority transferred a sum of RM39,000 from the current account of a customer to a third party account and a further sum of RM140,359.44 from the customer's fixed deposit account to a third party account. There the dismissal by the bank after a domestic inquiry hearing was upheld by the Industrial Court chairman. The learned chairman opined as follows:

> [44] That the claimants' owed a fiduciary duty to the bank as its employees cannot be denied. That they believed that such practices as they committed were permissible belies the fact that they could have risen to the position of Bank Officers without the intuition to discern that such practices were not only out of the ordinary, to say the least, but that it could have passed muster and be acceptable to any assiduous management authority, especially that of a bank, which in the main deals with other people's money. This notion remains in my mind notwithstanding the claimants' claim that they had never come across the bank's 'CSUG' whilst serving at the Teluk Intan branch. That is as maybe; but *surely in the many years that each served the bank (ie Mani – 25 years & Zul – 23 years) that they must be taken to know the difference between acceptable banking practices, on the one hand and the dubious, on the other*.
>
> [45] From the assessment of the facts as it emerged in this case this court is inclined to acknowledge the bank's contention that it was plain and obvious that the claimants' ought to have known that what they were doing could not be legitimate; and that it was improbable that they could not have known the true nature of their acts; and as a corollary, that they were in fact deliberately wilful in doing what they did to the detriment of the bank, and more particularly to its highly watched over reputation. The bank resolutely and convincingly argued that the claimants' had committed wrongdoings inconsistent with the trust and responsibility reposed in them by virtue of the fiducial relationship of employer/employee between them. *The claimants' had clearly acted in conflict of interest of their trusted position as Bank Officers; and thereby betrayed the loyalty that they owed to the bank as their employer. It was therefore unsafe and indeed unreasonable to expect the bank to continue their employment in the entire circumstances of the case* (see the cases of *Pantas Cerah Sdn Bhd v Lau Boon Seng* [1999] 3 ILR 216 (Award No 596 of 1999); *SGS-Thomson Microelectronics Sdn Bhd, Muar v Ibrahim Ahmad* [1997] 3 ILR 1123 (Award No 606 of 1997); and *HK Ananda Travel (Malaysia) Sdn Bhd v Khor Seng Kear* [2003] 3 ILR 1280 (Award No 761 of 2003)). (Emphasis added.)

[65] I too would concur with the decision of dismissal in the above case as what happened was hauntingly horrifying and no customer of a bank should have to suffer the anxiety and agony that funds from their accounts could disappear without their authorised payment out. It may be a single incident in the employee's 23 years of otherwise faithful service but when it happened as it did in the above case, it completely eroded the trust that the bank had hitherto reposed on the employee such that it was no longer safe and indeed would be

unreasonable for the bank to continue employing the employee who had committed such a grave misconduct devoid of any mitigating circumstance.

[66] The court was also referred to another award of the learned chairman in *Low Ah Heng v Cartrade Sdn Bhd* [2009] ILJU 783; [2009] 4 ILR 295 where even though there was no visible loss sustained by the company, yet the chairman had held that the dismissal was justified in a case where the employee had not disclosed that his wife had an interest in a company engaged in a competing business with the company. Of course in such a case of a conflict in interest situation, it is not any actual loss that is material for the company to prove but that the employee by putting himself in a position where his interest in another competing business through his wife had not been disclosed to the company, would be guilty of a fundamental breach of fiduciary duty expected of an employee such as would be sufficient for the company to dismiss the employee. Thus I have no quarrel with the stand quite properly postulated by the learned chairman as follows:

> [26] That the claimant owed a fiduciary duty to the company as its employee cannot be denied. That his wife was a partner in an entity that carried out a business (the servicing of motor vehicles) which was similar in nature to that which was carried out by the company was admitted. That the partner in the wife's business happened to be an ex-'Chief Mechanic' trained by the company is noteworthy. That she acted as a proxy to the claimant in that business cannot be discounted. All in all a negative reflection against the claimant as employee qua employee.
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> [27] The claimant raised the issue that the company had not shown that it had suffered or stood to suffer financial loss in this case. In answer to that issue this court has only to turn to the following case for assistance: *Jebsen & Jessen Eng (M) Sdn Bhd v Lian Man Hoong* [2001] 1 ILR 771 (Award No 179 of 2001) where it was held @ 779 & 780:
>
> > Actual losses need not be proved conclusively by way of evidence in conflict of interest situation, but possible detriment or loss to the employer is sufficient. Conflict of interest or even possible conflict of interest and the duty to disclose is one of the mechanism of safeguards of the interest of the employer. (Emphasis added.)
>
> [28] Given the foregoing *it is evidently clear that the claimant, in his managerial position, was guilty of misconduct given the potential or actual mischief that could be caused to the company by being linked to the competitor entity ('M Power Car Service') through the person of his wife. It would indeed be farfetched to believe that he could have been blind to the knowledge of the possibility of such mischief.* (Emphasis added.)

[67] The present case is not one of a conflict of interest situation and though there was no loss suffered by the company there was on the converse, a benefit attained though vicariously in the satisfied employee whose efforts had been appreciated by the company.

[68] There was also another case in *Hongkong Bank Malaysia Berhad v Jaafar Ahmad Thani* [2007] 4 ILR 601 involving a bank employee who failed to lock the safe before going on leave for the weekend. Mr Ernest Balasingam submitted that though the bank had not suffered any loss, yet the bank dismissed the said employee and that the Industrial Court upheld the said dismissal. Again in the banking industry, such an action would have seriously compromised the security of the bank and it was a serious misconduct justifying dismissal. The learned chaiman Mohd Amin Firdaus Abdullah reasoned as follows:

> [33] The termination of the claimant was based on the seriousness of the misconduct and his unfavourable service records. (Please see COB; p. 18). The learned author BR Ghaiye in book *Misconduct in Employment;* 'What is gross negligence?' The concept of gross negligence implies that the employee has deviated from the standard of care and attention which was expected from him. The concept of gross negligence implies that in a particular case the deviation is much pronounced or so much below the mark that the employee is not fit to be kept in service. On account of this the determination whether negligence was gross or not must vary according to the circumstances, nature of work performed by an employee as well as the position or status of the employee concerned.
>
> [34] *After analyzing and evaluating the evidence in totality in relation to the facts and circumstances of the case, the court finds that the claimant had committed a gross act of negligence in not locking the safe when he left the office on 5 December 1998 to go on leave for the weekend.* The claimant being a senior and high ranking officer holding the position of Assistant Manager Regional Support by his omission to lock the safe had deviated from the standard of care and attention expected from him. The deviation was so much pronounced when taken into consideration the position he was holding. He himself had opened the safe to obtain a duplicate key on the request of a teller when he should have locked it immediately after taking out the key but he neglected to do so. *The safe contained the ATM Combination Numbers and supervisor's swipe cards and other items. The learned counsel argued that the bank had not suffered any losses but as the same learned author stated in his book; 'The result of the misconduct would not be a criterion to judge the gravity of the same. The consequences that have actually followed the commission of a fault would not be appropriate measure to assess the gravity of the same. We have to examine the misconduct in each case.*

[35] In the Court of Appeal case *KA Sanduran Nehru a/l Ratnam v I Berhad* [2007] 1 CLJ 347; the appellant was an employee of the respondent and was dismissed from his employment on ground of misconduct that is for removing 1.5 litres of thinner for his own use from his employer's premises without prior approval. The Industrial Court found in favour of the claimant on the basis that the thinner was unwanted and the respondent only suffered a minimal loss of 1.5 litres of thinner.

[36] The Court of Appeal held that the High Court was correct to allow the respondent's application for certiorari. The former noted that what was material was that the thinner was the property of the respondent and the value of the thinner was immaterial as well as the fact that it was taken out of the respondent's premises without approval.

[37] Arguing by analogy, *the question here is not that the bank had not suffered any losses or serious losses or that the safe did not contain any important items or that it was just an isolated case, the very fact remains that the claimant had failed to exercise the standard of care expected from him in his position and as an employee with a decade of service. He had breached the bank's procedural guidelines*. To cite BR Ghaiye again; 'Gross misconduct is a serious misconduct. Neglect as often arises from forgetfulness as from anything else; and if the forgetfulness is in respect to an important thing it may well be good ground for dismissal of the servant without notice. It was argued that forgetfulness is not neglect unless it is habitual; but how can any rule be laid down as to how many times – once twice or more - a man may forget before his conduct amounts to neglect deserving dismissal? The line cannot be drawn; the question must depend on the particular circumstances of each case.

[38] In the *Law of Industrial Disputes* (5th Ed) Vol 2 by OP Malhotra on misconduct; the learned author stated on p 896 that an act of neglect, even isolated, which tends to cause serious consequences will justify the dismissal of the delinquent employee. (Emphasis added.)

[69] As can be seen, the inaction of the employee in not locking the safe was a serious misconduct and his decade of service with the bank cannot redeem him from such a ruinous act. Not so in the present case where the practice of organising an annual dinner for the staff had been approved or at least allowed during the time of the previous management with no question or query arising from it.

PRONOUNCEMENT

[70] For the reasons referred to above, the award of the Industrial Court remains unassailable in a judicial review exercise such as has been undertaken here. There is no error of law that would justify interference by this court exercising supervisory jurisdiction. The award cannot be said to have been arrived at irrationally or that relevant factors have not been considered or that irrelevant factors have been considered. Upon review this court had found that the award of the Industrial Court is proportionate to the nature of misconduct of the claimant employee.

[71] I had thus dismissed the company's application for judicial review with costs of RM8,000 to be paid by the company to the employee.

Application dismissed with costs of RM8,000.

Reported by Kohila Nesan